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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 121

PIERCE LONERGAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

PIERCE LONERGAN,
Pro Se.

HORACE W. DANFORTH,
Of Counsel.

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BRIEF FOR PETITIONER.

Introductory.

This brief is submitted to supplement the one already filed in support of defendants petition, and to facilitate consideration of the matters and things therein brought forward.

Hereinafter, that brief will be referred to as Br.; the opinion of the Circuit Court of Appeals (R. 449-457) as Op.; and the printed Transcript of the Record as R. The petitioner and appellant will be designated as defendant.

For convenience, the following data, with references to the printed Transcript, is supplied. The appeal herein was filed May 23, 1936 (R. 21), and submitted after argument February 1, 1937 (R. 448). The Circuit Courts' decision was rendered and filed March 5, 1937 (R. 448), and rehearing was denied May 10, 1937 (R. 457).

A statement of jurisdiction, and the ultimate pertinent facts were set forth in the petition and brief (Br. 3-6; 10); the opinion of the Circuit Court of Appeals (R. 449-457); the specifications of error (Br. 14, 22); these are incorporated herein by reference.

It has appeared (Br. 6), that the matters now presented for review by this Court arise out of the refusal of the Circuit Court to consider and pass upon certain assignments of error. It is contended that the errors thus refused consideration include both "Plain" and substantial error in the conduct of the trial which was so vitally prejudicial to the defendant, particularly in their cumulative effect, as to have resulted in denying him a fair trial, and, in respect to same at least, in depriving him of his right to due process of law. These were made the principal bases of the application for the writ (Br. 14-24). As to other included errors, it is further contended that certain of these show upon the whole aspect of the case, that the trial was so conducted as to permit such errors to permeate the entire proceedings, and to so prejudice, mislead and confuse the jury as, necessarily to eventuate in a wrongful conviction. These were previously considered (Br. 20).

Of the twenty-eight assignments thus refused consideration by the Circuit Court, this Courts' consideration is now particularly directed to the groups about to be stated. It is conceived that reasonable space, and the character of the present proceeding, do not admit of more. The grouped assignments are these:

Group 1: Assignments of Error No. XVI, together with Nos. XVII and XVIII.

Group 2: Assignments Nos. IX to XV, both inclusive.

Group 3: Assignments Nos. XXI, XXXI and XXXII.

For convenience, a table of references to the present printed Transcript, where the form and bases of these several assignments may be found, has been prepared, as follows:

No. IX: Assignment 400, Exhibit 376, Testimony 137-138;

No. X: Assignment 402, Exhibit 377, Testimony 181-182;

No. XI: Assignment 403, Exhibit 377, Testimony 138-139;

No. XII: Assignment 405, Exhibit 382, Testimony 88-89;

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No. XV: Assignment 410, Exhibit 383, Testimony 87, 88, 149;

No. XVI: Assignment 412, Exhibit 384, Testimony 184, 186, 187, 189;

No. XVII: Assignment 416, Exhibit 386, Testimony 185, 187, 188;

No. XVIII: Assignment 417, Exhibit 387, Testimony 185, 187, 188, 189.

No. XXI: Assignment 419, Testimony 128, 129;

No. XXXI: Assignment 426, Testimony 149;

No. XXXII: Assignment 426, Testimony 148.

Hereinafter, under the headings appearing, the several matters involved will be considered. In so doing, it is believed that it is essential to proceed along certain very definite and particular lines. It is conceived that the *whole* setting and background and this *case* must first be seen; that, thereafter the *precise content* of the specific charges against this defendant must become known; and that, then,

the *sum* and *substance* of the Governments evidence must be appraised by its own terms; all this, in order that the *full character* and *effect* of the errors assigned may become apparent. Such will be the order and purpose of this brief. In the argument following, any emphasis appearing will be supplied, unless otherwise expressly stated.

ARGUMENT.

The Outline of This Case.

In the first place, it is submitted that it is essential to consider the complete picture of what is here involved, in order that every detail may appear in its true perspective, without distortion or over-emphasis in any part.

In doing this, it is necessary to recognize that the enterprise with which this case is concerned had its first *inception* in the spring of the year 1931, whereas its *end* did not come to until the summer of *1934,* and until *after* the nation's legislation, bearing directly upon the subject matter of the enterprise, had been so radically changed as to preclude dealings such as that enterprise had contemplated and comprehended. In the losses which attended the end thus brought about, this case had its genesis. But in no sense did the enterprise *originate* its activities in 1933; and no difficulties whatever were experienced *until after* the passage on June 19, 1934, of the Congressional Act authorizing, *inter alia,* the nationalization of silver, which *latter* status of the metal was ultimately proclaimed by the President on *August 9, 1934* (R. 356-357; Instructions XXXV and XXXVI).

In the next place, it is necessary to remember that the establishment of a silver market in Seattle was an enterprise which it was conceded by all concerned was *wholly feasible,* possessed natural advantages of location, particularly in its relation to the Orient which was always a large purchaser of

silver, and at the same time had existing precedents for its guidance.

It is further necessary to remember that the defendant was the *pioneer* in the movement; that he was the *first* who perceived its possibilities, and, for a long time, was the *only* one in that section of the country who had taken occasion to advise himself at all on the subject matter, and the mechanics of its operation; and that, for these reasons he was, necessarily, at all times the *source* of information looked to by those who, ultimately, took up the enterprise: This, however, does *not* indicate that he was in *control* of the business of the different individuals or concerns who did so engage; or responsible for what they said or did. He interested them to engage, and informed them of the general objective and methods, and quite naturally became the head of the Exchange itself, as an institution; which, however, had its own by-laws and board of governors. But he did *not*, thereby or at all, undertake to dictate or control the business of those who became *members* of that Exchange, and dealt together thereon.

Upon the whole, and in truth and in fact, this defendant's situation is wholly due to the existence of *two* factors: his prominent and pioneering *position* in relation to the plan of establishing a silver market in Seattle; and the *Silver Purchase* Act of 1934, under authority of a provision of which silver was nationalized, and ceased to be a lawful basis for any market transactions, either for present or future delivery. His was the figure that prominently appeared, when the dislocation due to the Congressional enactment came; and upon his shoulders the individuals who had lost anything were easily led to cast the blame. Defendant submits that the evidence and the exhibits in this record affirmatively establish the error of any such charges as were brought against him.

Waiving any considerations of duplicity, of election, or the like, for the purpose of this statement, the indictment in this case certainly charged no less than that the defendant, *operating under four several fictitious names,* devised a scheme to defraud divers persons by means of sundry specified representations alleged to have been false, and in the furtherance thereof used the United States mails (R. 450). The indictment was originally in ten counts, but the trial court dismissed Nos. VII, IX and X (R. 344). The Government's attorney stated that; "Each Count * * * charges the *same* artifice and device to defraud, the only difference being * * * different letters * * * at different times" (R. 33). It is submitted that the indictment is *not* framed, and the trial was not conducted, upon any theory that a conspiracy had been formed to do the alleged acts. And, by the opening statement of the Government's attorney, *no joint action* was relied upon. Such attorney stated, that the defendant was the one with whom "We are *only* concerned" (R. 29). He further stated, that the Government would prove that the four companies, Gill and Company, Jordan and Company, Lonergan and Company and the Louis Martin Company, "were formed under the *authority and direction* of this defendant Pierce Lonergan" (R. 34), and that such companies were those "that were *operated* and that were *controlled* by this defendant Pierce Lonergan" (R. 35). Also he said, that "the Government's case will go to the proof that Mr. Lonergan, this defendant, was the man who *controlled* these four companies, was *the man who made these representations through these various salesmen through these hirelings, through these underlings of his*" (R. 36); and that under his *authorization,* these salesmen represented various things, "upon the *authorization* of this man standing behind *this thing* as a principal," and "acting under the *orders* and *authorization* of this defendant Pierce Loner-

gan" (R. 37). It is, therefore, submitted that the entire ultimate foundation of the Government's case rests *solely* upon the establishment of the charge that this *defendant*, in truth and in fact, actually operated under the *four several names* alleged; and in such sense that they, and each of them, were only other aspects and appearances of him himself, as his *alter ego*.

If this fundamental fact is *not* established by the evidence, then anything said or done by those operating under any of the firms not the defendant's own is, as to him, *res inter alios acta*, and he cannot be bound thereby; and to allow him to suffer therefrom is the most grievous error.

This is a criminal case. Upon its outcome depends the liberty and good name of this defendant. Hence, upon all issues raised by the allegations appearing in the indictment, the government must sustain the burden of proof. And that burden, in a criminal case, as the trial court instructed (R. 344, 345 *inter alios*), is that of establishing all such issues *beyond a reasonable doubt;* not merely to offer *some* evidence which, if believed, might seem reasonably to sustain such issues and charges, as in a civil case. Every other reasonable inference than that of guilt must be *excluded*. Whether the evidence appearing is adequate to justify such conclusion and belief is, it is submitted, now necessary to determine. It is submitted further that, in this case, the various essential charges and issues are *not* so established; and, in particular, that the fundamental charge above mentioned, to-wit, the identity of the defendant with *all* the several firms named in the indictment, is not sustained at all. And it is still further submitted, that, on the contrary, it appears, by the government's own witnesses, that the proof of any such charge beyond any reasonable doubt is *impossible*. With this in mind, consideration will next be given to an analysis of the proof which the

Government adduced, such consideration being directed to the purpose of establishing that the state of the record was such that any of the errors complained of, much less all of them together, would necessarily be vitally prejudicial to this defendant.

The Government's Evidence.

It is submitted that the Government did not establish the indictment as laid; and particularly did not establish that the defendant "engaged in the alleged silver brokerage business at Seattle, Washington, under the firm names of Pierce Lonergan and Company, Louis Martin and Company, Gill and Company, and P. A. Jordan and Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange."

It will first be desirable to refer again to the scope and limits of the charges upon which the defendant was tried, as a basis for considering the sufficiency of what was shown. Manifestly, the indictment was not framed upon the theory of any *conspiracy.* In his opening statement as already noted the government's attorney relied upon *no* claim of *joint action,* but said: "We are *only* concerned with the defendant Pierce Lonergan" (R. 29); and this was confirmed by the court's instructions to the jury, that Walsh's "plea raises *no presumption* as to the guilt or innocence of the *defendant* on trial" (R. 344), that "you are concerned *only* with—the defendant Lonergan" (R. 344), and that "the defendant on trial and another man, and *each* of them, devised a scheme and artifice to defraud" (R. 345). In view of this, it must follow that the trial was had upon the theory that this defendant *alone* was liable for all that was charged and shown, with its necessary corollary that *any and all* acts and statements introduced in evidence would be *connected* with him as their sole responsible cause. With reference to the character of the fraudulent "scheme

and artifice'' sought to be charged against this defendant, the Circuit Court has held in its opinion (R. 454); ''The indictment does not charge any scheme to steal money *nor* any scheme to *rig the market.* It charges 'a scheme and artifice to *defraud and for obtaining money* and property by false and fraudulent *pretenses representations and promises.*' '' By coupling a charge ''to defraud'' with one ''for obtaining,'' etc., the indictment made *intent* an essential ingredient in the proof of the offense charged. And the trial court so instructed (R. 348, 349; Instruction XLV, R. 360).

Defendant regrets that the Circuit Court, in upholding against assignment of error No. 6 the trial court's denial of his motion for a directed verdict, deemed it advisable to say: ''A detailed statement of the evidence would serve no useful purposes'' (R. 454). It would be very helpful at this time to know exactly the general lines and items of the evidence which impressed the court and influenced it in its decision, so that they might be dealt with and discussed directly and at once. Furthermore, such statement might otherwise prove of service to the defendant. (*Shores* v. *United States,* 80 F. (2d) 942, 948: Memorandum by Denman, Circuit Judge.)

It would be much appreciated, if the opportunity presented itself, to discuss in detail the numerous representations and promises which the indictment charges were falsely and fraudulently made by this defendant, and to assess them separately and successively in the light of all the evidence that was adduced. It is confidently contended that such an investigation would disclose fallacies and inadequacies now unsuspected, and inevitably lead to a different outcome. Such detailed discussion is, of course, impossible within the limits allowed here for such an argument. All that can be done is to point to the most outstanding insufficiencies of evidence, and earnestly invite this

Court to pursue the investigation to its conclusion, as is customary and requisite on such occasions (*McWhorter* v. *United States,* 299 F. 780, 781; *Bishop* v. *United States,* 16 F. (2d) 410, 412 (2).

At the outset, attention is called to the fact that the defendant put his character in issue, and established his previous reputation and good standing. Judges, lawyers, doctors, bankers and business men were called and their testimony was unvarying. Defendant's previous reputation, over many years, had been good. This the government did not undertake to controvert. And cross-examination went only to knowledge of the dealings of the particular witness in respect to the Seattle Metal Exchange. This fact of good standing should have bearing and weight in dealing with a defendant's own evidence in a case, and in arriving at a final determination as to guilt or innocence. (*Spalitto* v. *United States,* 39 F. (2d) 782, 784.) And, it is submitted, it is right that it should be so. A man's previous standing and good fame *should* be permitted to come to his aid and be deemed to support and sustain him, when, as here, he sincerely avers that he was the father of no "scheme or artifice" to defraud anyone of anything, or to obtain from them their money or property without value received. Without more, the court is respectfully urged to consider the following testimony of Beeler (R. 260), Rogers (R. 268), Moriarty (R. 268), Sullivan (R. 269), Jones (R. 270), Douglas (R. 271), Marshall (R. 272), Hacker (R. 272), Lundin (R. 273), Nicholson (R. 273) and Molyneux (R. 274), along with the testimony of Perkins (R. 232), Preston (R. 234), Arnold (R. 235), Greenwood (R. 238), Akerlund (R. 239), Eckstein (R. 241), Stole (R. 243), Lamping (R. 245) and Ballantine (R. 247).

It is said in the Opinion herein (R. 454),

> "The scheme described in the indictment was proved, substantially as alleged. There was substantial evi-

dence that appellant *devised the scheme* and, for the purpose of executing it, *mailed* the letters set forth in the indictment, or *caused them to be mailed.*"

By reference to the indictment, it appears that the basis of the scheme, and its method of operation to accomplish the alleged fraudulent purpose and intent, is set forth with much detailed particularity. In such a case, in *reversing* a judgment of conviction, it has been said:

> "(7) It is not necessary to prove all the false representations alleged in an indictment based on Section 215, *supra,* but it *is necessary* to prove those essential to lay a *sufficient foundation* for a finding by a jury that a scheme in substance was devised."
>
> *Rude* v. *United States,* 74 F. (2d) 673, at 677. (Citing cases.)

And, in an analogous case, the Ninth Circuit Court held

> • • • "Upon the charge it became necessary to prove that the whisky was imported from Canada. Mr. Justice Brewer, for the court, in Potter *v.* United States, 155 U. S. 438, 15 S. Ct. 144, 146, 39 L. Ed. 214, said: 'It is generally true, as claimed, that, where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid.' In the instant case, if the country from which the whisky was imported had not been given in the indictment, it might have been required by bill of particulars, but being given the proof became necessary."
>
> *Kennedy* v. *United States,* 44 F. (2d) 131, at 132.

And further in the same case, at the same page:

> • • • "Circumstantial evidence, of itself, is sufficient to convict if the *circumstances are consistent* with each other, *consistent* with *the guilt* of the party charged, *inconsistent with his innocence* and *inconsistent* with every other *reasonable hypothesis* except that of guilt."

It is submitted that there are many major "circumstances" in the instant case which cannot be made to square

with any hypothesis of guilt as charged on the part of this defendant. Attention will be called to certain of these, as the present argument proceeds. Under such conditions, it has been said:

> "but, when all is said and done, the rule quoted in Bishop *v.* United States (C. C. A.) 16 F. (2d) 410, is still the law, that, where circumstances are relied upon, they should be such as to *exclude any reasonable hypothesis of innocence.* From the printed page there is serious question whether the government proved any criminal plan. If the plan shaded from an honest to a dishonest one, the time it crossed the line is not shown by the record."
>
> *Beck* v. *United States,* 33 F. (2d) at 112.

And furthermore:

> "There must be substantial evidence of *guilt beyond a reasonable doubt.*"
>
> *Spalitto* v. *United States,* 39 F. (2d) 782, at 784, citing cases.

Regarding a number of the specified "representations and promises," which the indictment alleged were false, but little can be said herein by reason of space. The record does *not* establish that any representations that the defendant and the others concerned in the various firms named were "responsible, worthy and qualified," were, in fact, ever made. But, in any event, the evidence does not show that such representations, if they had been made, would have been false. And the defendant was affirmatively shown to have ample coverage for any commitments he might make (R. 219, 220, 236, 243, 245, 305-306). Neither does the record establish that the defendant ever stated that the Seattle Market was "connected" with other markets in any such sense as the indictment appears to infer; or that such other markets would "support" the Seattle Market in

any other sense than if the price declined there more than elsewhere, others would buy there for the sake of the benefit to them in price. Wherein the Seattle Silver Market was "*not responsible,*" whatever that may mean, was not shown. It does appear, however, that it functioned, without difficulty, until the passage of the Act of 1934 with its authorization of the nationalization of silver. And it also appears that its end came along with that of the New York market which, however, the government had supported by purchases therein (R. 339). It was shown to be true that the price of silver would rise (R. 74). It did rise, and was rising, prior to the enactment of the legislation above mentioned, as a result of which it could no longer be dealt in, and its price became immaterial. It is not made to appear that the possibility of trading in Seattle for smaller amounts than was possible in New York lured small and inexperienced investors into trading. On the whole, the governments investor witnesses testified to previous experience in market dealings, and confessed knowledge of margins and their significance. And their order cards expressed the terms of their contract fully (R. 75, *et seq.*). Other specified "representations and promises" will be referred to in what follows.

For the remainder of this consideration, *three matters* will be dealt with upon the record. First, the "scheme" *proved,* as compared with that *alleged;* second, that there was shown an *actual,* and not a "*so-called*" market; and third, that the defendant was not the four firms named, and did *not* operate or control them.

First, as to the "*scheme.*" The "scheme" charged was "to defraud *and* for obtaining," etc. This, as the trial court properly instructed (R. 345), necessitated the proof of *fraudulent intent.* All this must be proved as laid, beyond a reasonable doubt.

What ever the "scheme" was shown to be, the defendant originated it, and by his continued efforts fostered the establishment of a Silver Market in Seattle. The government relies upon this, because its attorney in his opening address said the defendant was the "man standing behind this thing as principal" (R. 37). There is, then, no dispute as to this. The present point is what *was* the "scheme" which the evidence shows. It did *not* originate in 1933, but prior thereto, and in *1931.* This the government's attorney himself states (R. 34). Since there is thus no dispute as to this point, the evidence appearing will be dealt with chronologically.

Defendant himself testified that he first became interested in silver in 1930 (R. 279). He told the story of his researches, (R. 279-281), resulting in a conclusion that the *Pacific Northwest had the natural resources of silver,* that its future depended on trade with the Orient, that other factors favorable to Oriental trade existed but there were *no adequate local facilities* for handling foreign exchange with the silver using countries of the Orient (R. 281, 282).

He formed a plan, a "scheme" let it be called, to provide those facilities. He incorporated the "Seattle Metal Exchange," and the "San Francisco Metal Exchange" in 1931, in order to hold the name (R. 283).

He then started on a campaign of education—almost a crusade. He wrote and spoke extensively on the subject. (See defendant's testimony as to Exhibit A-34; A-35; A-37-B; A-37-C; A-37-D; R. 285.) It must be borne in mind that *at that time* there was *no such thing* as silver futures trading, and so far as this record discloses no thought of any, anywhere. The New York Commodity Exchange, the only other organized silver market that ever existed in the Western hemisphere, commenced trading in silver futures on June 20, 1933 (R. 201, government witness Dutton). De-

fendant's sole idea, disclosed by what he then said and wrote, was to bring about the accumulation in the Pacific Northwest—or at least on the Pacific coast—of sufficient silver bullion to make possible the formation of an American owned foreign exchange bank to specialize in silver exchange with the Orient, and to make use in international trade of the produce of our nearby silver mines.

In the early spring of 1932, he went to Dr. Howard H. Preston, professor of money and banking at the University of Washington, with his "scheme" for using silver bullion as a medium of exchange (Preston, R. 234).

The minutes of the Mines and Mineral Committee of the Seattle Chamber of Commerce for May 7, 1931 (defendant's Ex. A-23), and June 16, 1931 (defendant's Ex. A-22), and the testimony of W. T. Perkins (R. 232), sometime president of the Seattle Mining Exchange, regent of the State university, and chairman of the sub-committee of the Mines and Minerals Committee of the Seattle Chamber, show that the defendant was working on this "scheme"—and what the "scheme" was—early in 1931. Among other things, Perkins testified on this point:

> "In addition to that Mr. Lonergan was at that meeting and made an address on the silver question and the possibility of arriving at interesting people here in the purchase of silver produced in the Northwestern mines, and exporting the same to the Orient. He was working at that time on a metal exchange to deal in the silver bullion for export purposes and he had interested the bank and others and expected to buy the silver produced in the Northwest states for export. • • • The committee had several deliberations; I talked with Mr. Lonergan on several occasions. He went into it very fully with myself and other members who were interested at that time. A great deal of silver is produced in Idaho and British Columbia; it goes from here to San Francisco for shipment. Mr. Lonergan was very

enthusiastic on the possibilities of a silver market here, and *I found no exceptions to his ideas* of establishing a silver bullion market'' (R. 233).

In 1931 or 1932, defendant went with his plan to George Greenwood, president of the Pacific National Bank of Seattle, a man with 30 years banking experience. Greenwood testified:

> ''In 1931 or 1932 he became very much interested in the matter of marketing silver, and in the problem of establishing a silver market and exchange in Seattle. We discussed from time to time the possibilities and probabilities of establishing such a market. In the course of our discussions we considered the *Department of Commerce's bulletin, ''The Silver Market''*, (defendant's Exhibit A-1). We discussed the flow of silver, its production and its consumption markets, the sources of supply in the Northwest, and the probability of getting an outlet for them through Seattle. *Our own bank investigated* through Mr. Lonergan the possibilities of handling silver, and he gave me considerable information and sources of authority on the problem, and the practicability of the location of such a market in Seattle, and in turn *I gave him considerable information regarding the operations of the banks, clearing house.* I informed him that the functions of a clearing house was to clear the obligations of the members of the association, and that balances of the members were likewise cleared every day from the association back to the members'' (R. 238-239).

And this bank stored and delivered silver on contracts (R. 243; 330) when this business started in 1933-34.

In 1931 or 1932, defendant attempted to interest Nathan Eckstein, leading citizen of Seattle, in establishing a silver market in Seattle. What defendant then did shows his ''scheme''. Eckstein testified:

> ''I have known the defendant, Mr. Lonergan for about 12 years. About three or four years ago I first

discussed with him the matter of the silver market. He wanted to get me interested in establishing a silver market in Seattle, so that a stock of silver could be on hand in Seattle, so that foreign transactions in silver currency countries could be based on that stock and that market. *In my opinion, if such market were established, it would be helpful to the trade here in Seattle,* because the Oriental countries base their currency on silver. There are enormous fluctuations in the value of silver. The buying power of Oriental countries goes up or down, and the greater the buying power of Oriental countries, the greater the possibilities of our export business, and the more favorable the silver exchange for them, the easier it is for them to buy in our market'' (R. 241-242).

Defendant discussed this matter with Lawrence Arnold, Vice-president of the First National Bank of Seattle, in charge of that bank's purchases and sales of securities. Arnold testified:

''During the years 1933 and 1934 the matter of establishing a silver market, and Oriental exchange market in Seattle, was discussed by us on six or seven occasions, as well as with other officers of our bank. In the discussions it was brought out that the establishment of the exchange would *first require the accumulation of silver bullion in Seattle.* The object would be the *ultimate engaging in exchange transactions with the Orient.* There is *no foreign exchange bank* dealing exclusively in exchange in Seattle *except* the Yokohama Specie Bank. These discussions brought out the consideration of the international and national economic conditions which were disturbing the monetary and banking system. *Because of the upset monetary and banking conditions we concluded that the local banks would not engage on their own account* on exchange transactions. It is a common practice in the City of New York and in San Francisco. I thought it was possible to obtain without any difficulty *seventy-five*

> *thousand dollars credit* to finance such an operation as the buying of silver bullion in one market for the purpose of selling it in forward delivery in another market" (R. 235-236).

Arnold did arrange for $25,000.00 backing from William Pigott (Defendant's Ex. A-21; R. 236).

Defendant made arrangements through Walter W. Stoll, secretary-treasurer of the Alaska Pacific Mines for extensive backing as required. Among other things he arranged with the Pacific Bank of San Francisco for the purchase of *250,000 ounces of silver* to be sold on the Seattle Metal Exchange. The *first sale* by the Pacific National Bank across the board of the Seattle Metal Exchange was for 100,000 ounces in *April, 1934* (R. 244). As to defendant's "scheme", Stoll testified:

> "I talked with Mr. Lonergan *many times subsequent and prior to the fall of 1933,* regarding the establishing of a silver market here in Seattle, where silver could be sold as well as bought. He believed that a very large market for silver could be established here. There is no question of his enthusiasm and his sincerity, and I believe that he was *thoroughly sound in his theory.* He requested me to find institutions and persons of means in Seattle and in the Northwest who were willing to buy bullion, or to buy futures in one of the larger established markets for the purpose of using that as a basis for sales in this market" (R. 244).

Similar backing for the "scheme" was furnished by G. L. Lamping, former manager of the Federal Branch of the Federal Reserve Bank and manager of the Seattle office of the Reconstruction Finance Corporation for three years (R. 240). As to the "scheme", Lamping testified:

> "The idea was to have me take over the credit features of borrowing against a deposit of silver bullion, and principally in local banks. The credit would be

based against silver bullion or silver. The banks were then to extend a loan against that with a certain margin of security over and above the New York quotation. The purpose was to establish *a silver market in this city* so that it would become *a market for silver all over the world,* principally Shanghai. The necessity and the desirability of having silver bullion accumulated and stored here by people who lived here was discussed'' (R. 244).

The government's witnesses testified to the same ''scheme'' and none other. Coventry, a principal witness for the prosecution, testified:

> ''I understood he was doing something toward building up a silver market here'' (R. 63-64). ''*He was absolutely right* that this was from the standpoint of time and place an excellent place for a silver market'' (R. 73).

Coles, government witness, whose customers seem to have made most of the complaints, and who, on his own testimony, made representations to purchasers that he, Coles, knew were not true, (R. 96), testified as to what defendant's ''scheme'' was as far back as *1932.* He testified:

> ''Mr. Lonergan had been *studying the silver situation,* the world silver situation, and was attempting to, I would say, educate me. He thought there was a big future in it, and I thought I could go out and sell silver bullion. There was no talk at that time about a silver futures. His thought was, and he was trying to impress upon me, was *to accumulate silver in the City of Seattle,* silver bullion'' (R. 83).

and again:

> ''At the meetings there was probably an inference that it would take three to five years to build up this market to a normal operating basis'' (R. 94-95).

and again:

> "Lonergan was *interested in building up volume* as a whole, but *not in any particular affairs* of the brokers or their agents" (R. 96).

Government witness McKnight, salesman for Coles, on this point testified:

> "Mr. Lonergan stated it would take some time before there would be *enough* silver so we could have *a real operating silver* exchange, *and probably a foreign exchange bank.* He stated it would take time to *familiarize the people,* the bankers and business men with the *foreign exchange* and *silver as a commodity.* I was under the impression there was only one exchange outside of Seattle in the whole United States. He *stated it was very essential* to this program in making Seattle an exchange that there be accumulated in the City of Seattle a large amount of silver" (R. 146-147).

Government witness Sternoff, who certainly was not friendly to defendant, testified:

> "He stated that the development of the Seattle silver Market would be the forerunner of the creation of *a foreign exchange.* I was primarily interested in working toward the future of that foreign exchange business; he told me that when I first became interested that it *would require a number of years* to build up an adequate silver supply here to create the basis for that foreign exchange business. He *repeatedly* during the period of time I was connected with the company *assured me* that the *real returns* for those who were interested in the Seattle Silver Market would come when they had achieved the position which would enable them to deal in foreign exchange transactions" (R. 165-166).

Government witness Thompson testified:

> "In the course of the discussions the advisability of establishing a *silver market* was based upon the further thought that there should be a foreign exchange or

> Oriental exchange bank established here in the Northwest, and *it sounded quite feasible.* We discussed seriously the question of whether that bank should be established in Tacoma or Seattle. Mr. Lonergan stated that we were *all working towards getting silver reserves,* in here so we could continue further operations. Mr. Lonergan thought it was feasible and practical that individual private parties could accumulate that silver in lieu of the banks' accumulating it, and I *cooperated to the extent of establishing a brokerage firm.* The idea was to break the silver down into small enough units so the average individual could acquire and store it, and in the aggregate accumulate a reserve here" (R. 174).

It is submitted that there is in the record no other evidence bearing upon the *nature and purposes* of the defendant's scheme, or upon his intent in carrying it out. In this connection, it is further submitted that the testimony of the government witness Charlotte Coventry (R. 223-226), offered at the very close of the case, bears upon its own face such manifest evidence of its absurdity and untruth, especially as it appears on page 223 of the record, as to deprive it of all credibility, and render it unworthy of attention by either jury or court. It obviously originated in an unbridled imagination, motivated solely by a strangely malignant spirit toward the defendant. It is, it is submitted, not rendered even plausible by any single circumstance in the entire case, but is, on the contrary, contradicted by all else that appears. In such situation, *"the weight of the evidence"* will be noticed. (*Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 25-26, 72 L. Ed. 761, 767).

It is also submitted that the fact that silver "futures" began to be traded in in Seattle about June, 1933, is of no significance in respect to the "scheme" and its purposes. It is certainly not any evidence, in the light of what has already been set forth, of any *change* in that "scheme",

much less the formulation of any *new* one. Trading in silver futures began in New York about the same time (R. 201). (Government witness Dutton). Even the government witness, Coventry, testified:

> "I saw nothing personally that was not entirely aboveboard, honest, and in good faith prior to July 27, 1934" (R. 65).

But, by July 27, 1934, the *Silver Purchase Act*, also authorizing the *nationalization* of silver, had been passed. And nationalization, as a *fact*, was declared about two weeks later. In that legislation, and in that alone, lay the cause of the difficulties which beset the Seattle market, and finally caused its close, just as it closed the silver market in New York (R. 115 and R. 201). It was in *this* connection that the Exchange was kept open and the various *offers* were made on the floor of the Exchange after July 27 (R. 115, 116). *No sales* whatever were made on or after that date (R. 75, 283). Such acts, under such circumstances, certainly could *not* be designated as "manipulations" of the market resulting from a *preconceived* intent to accomplish any purpose whatsoever, except to keep the market open; and particularly could they not result from any *intent formed in 1933* or theretofore. At that time, neither the defendant nor anyone else could foresee, or even suspect, that silver would be *nationalized in 1934*. Whether it was best to keep the market open or to close it, as a matter of ultimate result, was and is a matter of opinion and judgment. It certainly could not be any basis of a criminal charge. The quality of men's acts and judgments must be weighed and determined with reference to a national occurrence creating new conditions. (*Norcott* v. *United States*, 65 F. (2d) 913, at 919 (14)). It is finally submitted that the government proved *no* fraudulent "scheme" but positively established the contrary.

Second, as to the *character* of market shown.

The indictment alleges that this was not a market in fact, or a genuine brokerage business but was an "*alleged* silver brokerage business," and a "so-called Seattle Silver Market." The Circuit Court in this case has said:

> "The indictment does not charge any scheme to steal money nor any scheme to rig the market" (R. 454).

Thus is the issue squarely presented—did the government prove this this was merely a bogus, an "alleged", "a so-called" silver market? In other words, was there evidence sufficient to send this case to the jury on the theory that appellant was really operating any equivalent of a "bucket shop"? There is no escape from this position. The indictment does *not* charge that the appellant operated a silver market, or a brokerage business, and then *fraudulently rigged* that market in order to obtain money and property of others. The government charged that this was *not* a market at all—that it was merely a counterfeit. The allegations of the indictment must be proved as laid. It is assumed to be elementary that the form, tenor, or gravamen of an indictment cannot be changed upon trial thereunder. (*Gammon* v. *United States*, 12 F. (2d) 226, 228 and cases; *Naftzger* v. *United States*, 200 F. 494, 496-497; *Ex parte Bain*, 121 U. S. 1, 9-10, 13 and cases; 30 L. Ed. 849, 852, 853). What does the record show?

Let the start be made with the opening statement of the district attorney, (R. 29-41). He stated that the Seattle Metal Market was incorporated and that:

> "the evidence will further disclose that from the inception of this company early in the spring of *1931* down to about the twentieth day of June of 1933 the Seattle Metal Exchange dealt in contracts which will be referred to hereafter as spot silver contracts. Those are contracts which provided for the immediate delivery of silver itself. The evidence will disclose that they dealt in that type of contracts from March of 1931 down to

about June the 20th of 1933. The Government will prove that on or about June the twentieth of 1933 this Seattle Metal Exchange commenced to deal in what is termed as futures, that is, contracts for the future delivery of silver. They also commenced to deal in what is known as contracts, sellers' contracts for the future delivery of silver" (R. 34).

The opening statement then relates the organization of four brokerage companies, and states that the delivery months on the market were March, June, September and December of each year; that most customers invested in silver futures contracts, and that *only four* men were allowed to trade on the floor of the Seattle Metal Exchange.

There is not one word in the opening statement that the government intended to prove that this was *not* a genuine brokerage business and a real silver market. The nearest the district attorney came to that point was to say that the evidence "will show that this Seattle Metal Exchange was *not* financially responsible" (R. 37). He related certain alleged *irregularities in operation* in specific instances, and certain alleged *misrepresentations by salesmen;* but he never claimed that this business and market was *not* set up and operated as a genuine business and market.

On the contrary, in his opening statement, he *abandoned* the theory of the indictment, and in effect actually placed the inception of defendant's alleged "scheme" to defraud as of a date *after* the passage of the silver legislation on June 19, 1934. He said in effect that defendant, *acting on a rumor of the new silver legislation,* took steps to, and did, "break that market" (R. 39). He never claimed that this was a *bogus* market; only that it was a real market that was so *manipulated* after June 19, 1934, that it was wrecked. The indictment does *not* charge a rigging of the market; but, it is submitted, that, in substance, the opening statement does.

What then is the evidence on this point? *Not one word was introduced even hinting that the appellant's business was an "alleged" but not a genuine silver brokerage business; or that this was a "so-called" as distinguished from a real silver market.*

Coventry, government witness, office manager for Louis Martin & Co., testified:

> "For every contract that was bought through a broker on the floor of this exchange, there had to be a seller, that is, another broker found someone who was willing to sell the amount of silver that the buyer wished to buy" (R. 43).
>
> "The customers did not contract on the exchange themselves—they had to deal through a broker or an associate; then the member brokers went on to that exchange and contracted among themselves" (R. 73).

A market where orders are actually placed—that is, where the buying and selling orders are actually executed must be an *actual* market.

Coles, government witness, doing business as Norman Edward Co., testified:

> "The market operated *just like any commodity exchange*, and when the buyer put up his margin, or his guarantee, that he would take delivery, and on the other side of that transaction was the seller, who likewise put up his guarantee that delivery would be made. • • • *That is what this was.* The buyer and the seller met. Transactions were made. The margins were kept in the Clearing House" (R. 84).

Goggin, government witness, and sole owner and operator of P. A. Jordan Co., testified:

> "The operations of the Seattle Metal Exchange were similar to that of *any other ordinary market* dealing either in securities or commodities. It was a designated place where members met and transacted business. One

broker had an order to purchase. He came upon the floor of the Exchange and said, 'I offer one contract', or whatever the designated amount would be, at a certain price. If there were any bids, or if some other broker had a sale at some designated price, why, he would say, 'I bid a certain figure'. And if the price is met, there was a complete transaction. If the prices were not the same, there wasn't any transaction, and the broker did one of two things, he either allowed the offer to remain, or he would call back his office and inform the office, or the floor man, or the customer's man, that he couldn't buy at that price or he couldn't sell at that price, and then give him the quotation, that is, the bid and offer. And it may be that the bid and the offer would be changed to meet the transaction, if the offer or bid was still on the floor. On the other hand, there were orders at the market, and the broker would bid a certain price, the seller would offer at a certain price, and so on the brokers would meet upon a particular price, and the transaction would be completed" (R. 101-102).

"The practice of the clearing house was similar to the practice of the clearing house of the Los Angeles Stock Exchange or the San Francisco Stock Exchange clearing house. At the time delivery date came due on contracts there would be an actual delivery made" (R. 114).

Thompson, government witness, and member of the firm of Ray Thompson Co., testified that the orders taken by his firm were executed on the floor of the Seattle Metal Exchange (R. 171).

Gill, government witness, and sole owner of Gill & Co., testified:

"Tender of silver was made on all outstanding contracts on the Exchange *during delivery months* by the brokers who had outstanding selling contracts to those who had outstanding buying contracts" (R. 199).

Dutton, government witness, secretary of the Commodity Exchange of New York, described the method of trading on the *New York* market (R. 202, 204). It was *exactly* the method followed in Seattle.

The London silver market is operated by *four* firms only, and its method is the same as was used in Seattle (R. 70-72).

The rules and regulations of the Seattle Metal Exchange were a *copy* of the rules and regulations of the New York Commodity Exchange (R. 288). The general laws of the Seattle Metal Exchange were identical with the basic laws of other commodity exchanges in this country (R. 289).

Certainly all the commodity exchanges of this country are not "pretended" and "so-called".

There isn't one word of evidence in this record to show that any of these brokers, or associates, ever took an order and carried it out himself. The record shows affirmatively that all orders received to either buy or sell were *executed on the floor of the exchange*, and there only. If a broker received orders to buy, he went on the floor of the Exchange and contracted in his own name an aggregate amount of silver to cover the buying orders he had received from customers. That is not the technique of bucket shop operators, or of anything except *a bona fide* [redacted]

Neither the size, nor the financial strength of an institution is of importance in the consideration of this point. A man legitimately may engage in a brokerage business without having a long established business, or possessing great financial strength. *Genuineness* is not to be determined by the volume of business done, or the wealth of the brokers. It is not relative to such factors.

There is not one word of evidence in this record that defendant sold anything that he had not already bought. The Government's attorney stated that "this defendant, Pierce Lonergan, *knowing he* could not cover these contracts, that he could not make delivery when these contracts came due,

* * * made large offers of silver futures contracts in his local exchange down here", but there is no evidence to make that statement good. Defendant bought in large blocks on other markets, at wholesale as it were, and sold in small lots, retail quantities, on the Seattle Metal Exchange. His testimony stands uncontradicted:

> "At no time from June, 1933, to August 9, 1934, was there any time that I was not hedged or covered at a profit on the basis of outstanding contracts I had on the exchange. I think there would be about 65,000 ounces open on the September 1933 delivery. As I went into December of 1933, there was approximately 130,000 ounces. There was a profit in the December delivery of approximately 3 cents. There was about 225,000 ounces open on the March, 1934, delivery, at about a 3 cent spread. I think I acquired this at about 42 cents, and the average daily price here was 43 cents. They moved up about 3 cents a delivery, or about 1 cent a month. The next delivery was June, 1934. There was open then, in round numbers, either 325,000 or 370,000, I would say 350,000 to fix the figure, in which I had about a 3 cent advance over what I had contracted, as I figured that was the only safe price. I was prepared and ready to make delivery of the contracts on the delivery months, and tender was made, silver was brought into Seattle for the December delivery in the amount of 125,000 ounces" (R. 305, 306).

It is submitted that the government's own evidence conclusively establishes that this was an *actual* market, operating in the ordinary and usual way, not only in 1934, when silver was nationalized, but in 1933, and prior thereto, as far back as 1931. The indictment charges as to "alleged silver brokerage business," and "so-called Seattle Silver Market," were not proved as laid, or at all.

Third, as to the *four firms*. The indictment charges the *defendant* with "being *engaged* in the alleged silver broker-

age busines at Seattle, Washington, under the *firm names* of Pierce Lonergan & Company, Louis Martin & Company, Gill & Company, and P. A. Jordan Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange."

The district attorney in his opening statement referred to the concerns as:

> "Those four companies that were operated and that were controlled by this defendant, Pierce Lonergan" (R. 35).

He also said that the evidence would prove that:

> "this defendant, was the man who *controlled these four* companies, was the man who *made these representations,* through these various salesmen, through these hirelings, through these underlings of his" (R. 36).

In other words, this case was tried on the theory that these four companies were, in effect, merely alter egos for Pierce Lonergan. Again, what was the proof?

Defendant himself testified positively that he had *no interest* whatever in any of the firms, except Pierce Lonergan & Co., and that he had *no control* over their business or operations (R. 302, 317, 318, 319, 331). As has heretofore been noted, the defendant's testimony in this case, in view of his previous unchallenged and uncontroverted good character and repute, should be considered and given weight.

W. G. Coventry, for the government, testified to the make-up of the different companies, and said:

> "The head of Louis Martin Co. was Mr. John R. Walsh" (R. 42).

He said that all money received by him (witness) in the course of business was turned over to Walsh (R. 47). He further said:

> "Yes, certainly, Lonergan had *no interest* in Martin & Co.; I believe it was a corporation" (R. 64).

It appeared that defendant had previously sold out all his interest in the corporation to Walsh (R. 287). And the transfer was established by documentary evidence (R. 287, Exhibit A-38).

N. E. Coles, government witness, testified that he was first with Louis Martin Co., but in January, 1934, started his own brokerage business as Norman Edward Co. (R. 83, 91). He testified:

> "He certainly did *not* share in or get any of the commissions of Norman Edward Company. He had *no interest* in my commissions. He never held any position with Norman Edward Company" (R. 95).

Coles further testified that defendant had had no interest in the business or customer's accounts of any of the firms:

> "He (defendant) was *interested in building* up volume as a whole, but not in any particular affairs of the brokers or their agents" (R. 96).

G. T. Goggin, for the government, testified that he was a member of the Exchange, and stated:

> "P. A. Jordan & Co. was *my* firm" (R. 101).

And he also testified:

> "I was the *actual manager and operator* of the P. A. Jordan & Company; Mr. Lonergan had *no interest* in any commissions or any profits that were made by *any* of the member brokerage companies on the Seattle Metal Exchange; especially he didn't have any with P. A. Jordan & Company. It was the purpose of P. A. Jordan & Company to act as a seller and to buy various accounts that were assigned to P. A. Jordan & Company, such as the account of the Pacific National Bank in San Francisco. Instead of having the Pacific National Bank act as the seller on the floor of the Exchange because their commitments were in large amounts of 100,0000 ounces, they were assigned to the

various so-called street accounts and broken up into small 500 ounce lots'' (R. 114).

W. R. McKnight, a government witness, testified that his employment was with Norman Edward Co., commencing in March, 1934 (R. 145). He further testified:

> ''Mr. Lonergan had *no authority* over me. Mr. Lonergan had *no salesmen* as far as I know. The sales meetings were the meetings of Norman Edward Company, Gill & Company, Martin & Company, and P. A. Jordan Company. The P. A. Jordan Company was represented by Mr. Goggin. The purpose of the meetings was to discuss the silver market, the price of silver, and inform those present as to the changes in the market, different bills that were being passed in Congress, or up for passage. We knew that many outside influences might affect the price one way or another'' (R. 145-146).

He also said:

> ''He (defendant) stated at these meetings that he was acting as a broker, and also president of the Exchange. I do *not* know of any salesmen he (defendant) ever had. To the best of my knowledge, Mr. Walsh, Mr. Goggin, Mr. Gill and Mr. Lonergan were operating independent of each other. Mr. Lonergan explained that outside markets would support the Seattle market *when prices were cheap enough here* so that purchases could be made here as well as on the outside market at a profit'' (R. 147).

L. J. Gill, a government witness, testified:

> ''I became a member broker under the name of Gill & Company; it was *purely* a firm name for an individual—myself'' (R. 195).
>
> ''Mr. Lonergan had no control whatsoever of my salesmen ——; the operation of my business was solely up to me'' (R. 258).

He also testified:

> "To my own knowledge all the members of the Seattle Metal Exchange were separate organizations and separate firms" (R. 259).

Thus out of the mouths of the government's own witnesses, and from the only parties who were in a position to have actual knowledge whereof they spoke, it indubitably appears that the *four firms* were *wholly separate*, that the defendant did not own them, and, on the contrary, had *no interest* in them and did not control their acts and doings. He did *not* stand behind them "as principal" or at all.

That all should seek the defendant's counsel and advice in the matters going forward was but natural and necessary. As pointed out at the beginning, and as since fully shown, the defendant was the originator of the idea of a silver market in Seattle, a thing unthought of by anybody else. He was the only one who had taken the time and trouble to advise himself about it, and about how it should be conducted and carried on. Naturally, he passed his knowledge on to those who became identified in the movement. Also naturally, he advised with them and their salesmen respecting what he continued to ascertain, as far as he was able. Especially so, since he had become President of the Exchange, and hence felt in duty bound to keep track of what was going forward in the enterprise. And there is no testimony that he ever did more. It is submitted that the charge of the indictment, that the defendant engaged in business under the *names of the four firms* mentioned is wholly unsustained. Neither is it sustained that he operated or controlled them in the business they actually did with their customer. He owned and controlled Pierce Lonergan and Company, and nothing more. And he had no salesmen. As to the organization, status and "operation" of the

"so-called Seattle Silver Market," and the relations of the brokers who dealt thereon, the unquestioned testimony of the Government itself is as follows:

Coventry testified (R. 49):

> "The Seattle Metal Exchange was under control of the Board of Governors of the Seattle Metal Exchange (R. 69) to the best of my knowledge the Seattle Metal Exchange was controlled exclusively by four men, Pierce Lonergan, John R. Walsh, Louis Gill and George Goggin (R. 74) the Exchange and the Clearing House composed of these four member brokers was operated as distinct from the brokerage houses."

As previously noted the record discloses that the great London Silver Market is conducted by four firms (R. 70) and the New York Commodity Exchange had but six silver brokers (R. 203).

The relation of the defendant to the Exchange was similarly afforded by the Government. The witness Coles testifying for the government stated (R. 95):

> "Mr. Lonergan was the nominal head of the Seattle Silver Exchange. I do not know whether he was President or Manager, but I knew him as the head, or the authority. His advice was generally sought by all of the brokers and associated brokers, and salesmen as to matters of policy, forms to be used, interpretation of newspaper articles and the like that were coming out. Primarily my interest in making inquiries of Lonergan was to be sure that I complied with the rules and regulations of the exchange. He did not have direct authority to order me to buy or sell for any of my customers. His advice was simply accepted because of my confidence in him, and because of my respect for his knowledge on the subject."

The status and operation of exchanges in general, inclusive of "commodity" exchanges, is extensively examined and clearly stated in an article in one of our case authorities.

10 R. C. L. 1190-1210 particularly Sections 2, 5, 9, and 10.

This same subject matter was further elucidated by the defendant, particularly by reference to other authority (R. 297-298), quoting: "Risk and Risk-Bearing," by Charles O. Hardy, of the Brookings Institute.

In face of a state in the evidence such as the foregoing discloses, whereby a finding of innocence would at the very least be amply sustained, it is manifest how fatally prejudicial were the errors of which complaint is now made, the several groups whereof, as indicated in the opening of this brief, constitute the basis of the present proceeding. Discussion of this will now be had, in amplification of what appears in the brief already filed.

I.

1. The admission of Exhibit 75 was "plain error"; and deprived the defendant of due process of law. The erroneous admission of the Exhibits 76a and 76b, as being connected with Exhibit 75, further enhanced the error involved in the latter.

The assignments relating to these exhibits "have herein before been designated as Group 1." The subject matter has already been dealt with (Br. 14-21). The error of the Circuit Court in refusing to consider these assignments as a part of the twenty-eight (Op. 454) is also subject to all the considerations, as to their *form,* which will be brought out under the next succeeding heading herein, and it is respectfully requested that this be borne in mind. The chief vice,

however, of Exhibit 75, contributed to by 76a and 76b, is that relied upon in the former brief, as above indicated. At the present time, but little additional thereto will be said. The foundation of the contention here is that by the courts' action complained of, there was introduced into this case an element entirely foreign to the theory and purposes of any trial, and wholly destructive of the concept upon which, in any due and orderly fashion, any such trial may proceed. What was admitted was not, and could not be, evidence at all.

Thayer, Preliminary Treatise on Evidence, pp. 187, 195, 197, 263.

By the introduction of Exhibit No. 75, the jury was subjected to an extraneous and wholly unproper influence, which could, and by the outcome presumptively did, conduce to and result in the verdict rendered, as much as though the action and deliberation processes of the jury had been overborne by any other extraneous influence or force.

Frank v. *Mangum*, 237 U. S. 309, 312, 314, 327, 335, 336; 347 (dissent opinion Justice Holmes), 59 L. Ed. 969, 971-972, 979-980, 983-984; 988 (dissent).

The foregoing case dealt with the provision of the 14th Amendment as to due process of law which is analogous to the provision of the 5th Amendment as to the same subject matter.

In the instant case, the defendant was deprived of "due process" as guaranteed by the 5th Amendment, as well as of a trial by "an impartial jury" as guaranteed by the 6th Amendment.

And, even if this were not so, still the matter complained of is such as that, upon the entire record, it must be reviewed.

McCandless v. *United States*, 298 U. S. 342, 347-348, 80 L. Ed. 1205, 1209;
Cook v. *United States*, 138 U. S. 157, 184-185, 34 L. Ed. 906, 914;
St. Clair v. *United States*, 23 F. (2d) 76, 78 (C. C. A. 9);
Mexia v. *Oliver*, 148 U. S. 664, 673, 37 L. Ed. 602, 606;
Smith v. *Shoemaker*, 84 U. S. 630, 636-637, 639, 21 L. Ed. 717, 719;
McNutt v. *United States*, 267 F. 670, 673.

It is submitted that this error alone requires reversal of the conviction herein.

We present those errors under Assignments XVII and XVIII, referred to in the brief (Br. 22) as more properly and conveniently considered in connection with the error just presented.

Assignment XVII and XVIII.

These assignments relate to the admission in evidence (R. 188) of the Government's Exhibits Nos. 76a (Ex. R. 386, Test R. 185, 188) and 76b (Ex. R. 387, Test R. 187, 188). Both of these contributed to and were bound up in the errors inhering in the admission of Exhibit No. 75, which have just been discussed. As was pointed out at the time (R. 188), both are no part of the *res gestae* of the case charged in the indictment, are too remote in time, and are neither of them identified as connected with the defendant. Both are, on their own faces, *res inter alios acta*. No. 76a signed by "(M. L. H.)" is certainly no reply to No. 75, addressed to the defendant personally. And No. 76b similarly signed was stated by Mr. Atwood himself to have

been in reply to *a letter of his own*, dated August 19, (R. 185). Exhibit 75 is dated August 17. In respect to No. 76a, what happened, as the Government would have it inferred, was that Louis Martin Co., on receipt of the copy of No. 75 sent to them by Battle, Hulbert, Helsell & Bettens (R. 184, 186), compiled the required information on account of *sales which Louis Martin Co. itself* had made, and of which it had the knowledge and records. But no proper foundation was laid in the evidence for its introduction, and its authenticity was not established. Both Exhibits 76a and 76b are signed by initials, "L. M. H." The author was never identified or was authority established. The Exhibits are dated August 20th and 21st, respectively—more than eleven days after the nationalization of silver, August 9th, 1934, and more than 20 days after the termination July 31, of the alleged plan, as charged by the District Attorney (R. 40). Under such circumstances it should not be presumed that the exhibits were sent in the ordinary course of business. The regular business of the company had ceased. The authenticity of the exhibits was never established, and letters of course, do not prove themselves. The defendant did not figure in the transaction at all. No. 76a was obviously no answer by the defendant to No. 75. And no answer thereto by him was made to appear. No. 76b, by its own terms, negatives any connection with No. 75, since it refers to a letter *"of the 19th day of August"* which, as has been noted above, was the date of the letter which Atwood himself fixed (R. 185), as that of his own letter, which was never introduced in evidence.

These exhibits were not within the issues laid in the indictment. Their only effect if properly admissible for any purpose, would be to show cumulative evidence from which good faith or intent might be negatived or design shown. There is in the record no evidence of a transaction similar to that involved in the circumstance which these documents

were a part. The situation arose out of a demand for an accounting after the transaction to which it relates was closed. There is not in the record any other correspondence or evidence of this character. Inferences may properly be attached to this correspondence which may not properly be applied to any other disclosed in the record. An additional element is the fact that the transaction, to which the correspondences allegedly relates, is one occurring one hour previous to the President's proclamation, and allegedly made in anticipation of such proclamation. Again the circumstance does not conform to that of any other transaction disclosed in the record. Cumulative evidence introduced for the purpose of showing intent must be of circumstances similar to those from which like inferences may properly be made. To show design or plan such evidence must have conformity to circumstances within the issues. Neither Exhibit 75, 76a nor 76b come within these rules. Wigmore on Evidence (2d Ed.) Vol. 1, Sec. 302, p. 617. Further Exhibits 76a and 76b were not *res gestae*. Exhibit No. 75, dated August 17th, 1934, had already been properly ruled out (R. 187), as too remote in point of time (among other objections). It is indeed a novelty that alleged replies to that Exhibit made four days later could be considered other than more remote. The admission of these exhibits was prejudicial error, within the principles hereinbefore cited. But more than that, the error contributed to the error in admitting Exhibit 75. It has already appeared that the court finally admitted that letter, expressly because these two had been admitted (R. 189).

II.

It is further submitted that certain at least, and the most vital and prejudicial of the assignments of error included in the Circuit Court's general rejection at pages 5-6 of the opinion (R. 619), substantially comply with the spirit and purposes of the rule invoked by the court; but, in any event, they must be considered in this case.

The opinion states, pages 5-6:

> "Twenty-eight assignments (numbered 5, 9, to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments *do not indicate* that any of this *evidence was objected to in the trial court.* They do not state *what objections,* if any, *were made, nor the grounds thereof,* nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our Rule 11 and will not be considered."
>
> *Cody* v. *United States* (C. C. A. 9), 73 F. (2d) 180, 184;
>
> *Goldstein* v. *United States* (C. C. A. 9), 73 F. (2) 804, 806.

The twenty-eight assignments thus disposed of involve various subject matters, and disclose different classes of error. It may be agreed that some of them may be too comprehensively stated, and too lacking in specific record reference, to require their consideration by that court.

But it is submitted and most earnestly urged that some of those assignments especially those presented herein come clearly within the spirit and purposes of former Rule 11, as that court has heretofore interpreted and applied it. And it is obvious that these errors are highly material and prejudicial in view of the state of the evidence.

The appeal from the District Court's judgment was filed May 23, 1936 (R. 21), and submitted on oral argument to

the Circuit Court February 1, 1937 (R. 448). The decision of that court was rendered and filed March 5, 1937 (R. 448). And rehearing denied May 10, 1937 (R. 457).

Rules of the Circuit Court of Appeals for the Ninth Circuit adopted November 1904 as amended June 15, 1926, were in effect as of the date and submission of the case (Manual of Federal Appellate Procedure (2nd Ed.), Cumulative Supplement by Paul O'Brien, 1936, Rule 11, page 164). This rule was amended December 22, 1936, to be effective February 1, 1937. (O'Brien, *supra,* page 164, reprint.).

Rule 11 as it was in effect when this appeal was taken, so far as is pertinent here, provided:

> "When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote *the full substance* of the evidence admitted or rejected."
>
> O'Brien's Manual (2nd Ed., p. 164).

The present form of the corresponding part of the Rule, effective February 1, 1937, is:

> "When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall *quote the grounds* urged at the trial for the objection *and the exception* taken *and the full substance* of the evidence admitted or rejected."
>
> O'Brien's Manual (2nd Ed., p. 164 (addendum).

The difference between the two forms of the Rule, in content of requirements for statement *in the assignments,* is readily apparent.

In *all* the assignments here presented, it appears upon inspection that the plan of statement adopted in *each* comprehends the following: First, there is a *narration* that "the court *erred in admitting* in evidence, and denying defendant's motion to strike, to which *exceptions were taken*

and allowed" certain evidence. Following this appears the *obnoxious evidence* in *totidem verbis*. Then appears a *narration* of the *evidential basis* upon which the evidence objected to was admitted. And this is followed by an itemized *narration* of the grounds upon which the evidence thus admitted was objectionable.

It is submitted that the foregoing plan of statement, in all substantial respects, complies with the rule, so long as assignments are permitted to be made at all by narration or *quotation of "substance."* By the *present* wording of the Rule, of course, narration in *any* form in an assignment of error appears no longer acceptable. But it is submitted that such is *not* the effect of former Rule 11, by which, of course, the present case is necessarily controlled.

By reference to the Bill of Exceptions in the transcript of the record on appeal in which the assignments of error are incorporated, it appears that in every instance, the evidence in question is *correctly reproduced* in the assignment; that objections *were* duly interposed and denied; and that exceptions were *actually allowed*. In urging the several assignments in the brief, page references to the transcript appear, whereby recourse to the record for corroboration and verification is facilitated. It is true that the grounds of objection as stated in the assignments do not appear in all instances in *totidem verbis* as in the Bill of Exceptions. They are itemized, clarified and amplified, *in their statement*. But it is submitted that the *gist of all* the grounds appearing in such amplified statements is represented in the grounds of objection actually stated to the trial court; whereby it does not appear that the appellant sought to shift his position, or inject into the appeal for consideration by the Circuit Court questions upon which the trial court had had no opportunity to pass. It is submitted that, under such circumstances, the language introducing the assignments: "The court erred in admitting—to which

exception was taken and allowed—the reasons such exhibit (or evidence) should not have been admitted, and that it should have been stricken'' constitutes the fair equivalent of a statement of the ruling of the court, the taking of an objection and the grounds presented to the trial court. Courts are not meticulous in mere wording, where substantial rights are at stake.

(*Simpson* v. *Dall,* 70 U. S. 460, 18 L. Ed. 265, 266.)

The court ruling, the objection and exception with the grounds specified will be found in fact to be those which were stated at the time. In some instances they may appear to expand that statement: But this is so only to the extent of drawing the legal inferences, or the legal conclusions, following from a mere general ground, of which necessarily, the trial court itself took, and was bound to take, judicial notice. It is respectfully submitted that all the assignments above enumerated were entitled to consideration by the Circuit Court.

In the part of the Circuit Court's opinion above noted, as authority for its ruling is cited *Cody* v. *U. S.,* 73 F. (2d) 180; and *Goldstein* v. *U. S.,* 73 F. (2d) 804. Both these cases cite as authority *Meehan* v. *U. S.,* 70 F. (2d) 857. All three cases are Ninth Circuit Court decisions. These cases when analyzed in their entirety disclose that that court had an established practice in such circumstances. This practice was to consider the sufficiency of assignments in connection with the particulars in the record, especially where the assignment contained any specification of error whatever. Both the *Cody* case and the *Goldstein* case cited show that they followed that practice in those cases. In the *Meehan* case no specification of error whatever was made, and none of them except one, made any mention, in any manner, of any objections ruling or exception. However (at P. 859, paragraph 4-7) in respect to ''assignment

19," it is said the question raised thereby, "was not presented to the trial court and need not be considered on this appeal," under Rule 11. Manifestly, this could not become known, except by reference to the record in the bill of exceptions. The necessary inference it would seem, is that had the record supplemented the assignment it would have been sufficient to require the court's consideration. But, in any event, it discloses the court having recourse to the record, to test the assignment.

Such being the basis and the scope of the decision in the *Meehan* case, it is submitted that its proper content, as an interpretation of former Rule 11, should not be taken or considered to have had engrafted upon it essentially new and different requirements by the *Cody* and *Goldstein* cases, which expressly rest upon it. Rather, it is submitted, should those cases be interpreted merely as expressions and illustrations of the rule of the *Meehan* case. In which event, the assignments in the instant case, now under discussion fully measure up to the spirit and purposes of former Rule 11; and this fact is fully demonstrated, if the original record in the bill of exceptions is looked to, as has been seen to be customary.

The assignments in the instant case certainly advised both the court and opposing counsel of the precise errors that would be relied upon, and the grounds upon which the alleged error would be claimed to inhere. That such, and such only, is the spirit and purpose of any rule such as former Rule 11, is apparent from consideration of *Seaboard Air Line R. Co.* v. *Watson,* cited and quoted in the *Meehan* case, *supra.* In that case the Supreme Court held:

> "Every appeal must be accompanied by an assignment of errors which shall 'set out separately and particularly each error asserted'. Rev. Stat. 997, U. S. C. Title 28, 862, Rule 9. The purpose is to enable the court, as well as opposing counsel, readily to perceive

what points are relied on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. (Citing cases.) And as the rule makes for convenience and certainty in the consideration of cases the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule even if the opposing party raises no question and treats it as adequate. The quoted assignment amounts merely to a complaint that the Supreme Court erred in not reversing the judgment of the trial court because 'in the trial of this case' the 'scope and effect' of the section deprived appellant of its property in violation of both the due process and equal protection clauses. An allegation of error could scarcely be more indefinite. It does *not* identify *any ruling* at the trial or specify any basis for the assertion of deprivation of constitutional right. It presents *no question* for our consideration." *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86, 77, L. Ed. 180, 184.

It thus results, it is submitted, that in order to know the content and meaning which the Circuit Court had previously given to former Rule 11, which content and meaning it incorporated, by citation, in the *Cody* and *Goldstein* cases, the case of *Meehan* v. *United States* must be followed, and by that case, and also by the others, as has been seen, in making an ultimate determination of the question of the *sufficiency* of a particular assignment, the bill of exceptions is *customarily consulted* and considered. It is also respectfully submitted that, when he prepared his bill of exceptions and his assignments of errors, defendant had the right to expect the two things *would* be taken and read together; and that he had the further right so to expect, by virtue of the decisions above mentioned and considered, particularly *Meehan* v. *United States.*

Thus far, the purpose has been to show that, in all essential substance, the enumerated assignments are clearly

within the spirit and purpose of former Rule 11. It will now be urged that, even if those assignments, or any of them, for any reason whatsoever are deemed to fall below the standard actually set by that Rule, nevertheless, the errors they challenge are such that, in view of the evidence in the case, they should still be considered by the court since they were vitally prejudicial to the defendant.

Rules, after all, are not sacrosanct. They are but means to an end. The primary purpose of all procedure, and of all litigation, is that the respective rights of contending parties may be justly preserved, and justly determined in the outcome. *Brasfield* v. *United States,* 272 U. S. 448, 450, 80 L. Ed. 345, 346, 47 Sup. Ct. Rep. 135; *New York Central Railroad Co.* v. *Johnson,* 279 U. S. 310, 318-19, 73 L. Ed. 706, 710-11.

The instant case is not civil, but criminal, and upon its outcome depends this defendant's liberty and fame. In such a case, it has been said by the Supreme Court:

> "In criminal cases *courts are not inclined to be as exacting* with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not *properly raised* at the trial by *objection and exception. Wiborg* v. *United States,* 163 U. S. 632, 659, 41 L. Ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197." *Crawford* v. *United States,* 212 U. S. 183, 194, 53 L. Ed. 465, 470.

In the instant case, it is not required to go so far. All that is here said against these assignments is that *in form* they do *not sufficiently indicate and reproduce the trial record* to entitle them to consideration under former Rule 11.

The conditions under which an error appearing is of such character as that it will be *presumed* to have preju-

diced substantial rights of the party, and so, to *require* correction at the hand of a court, are well stated in the case of *Little* v. *United States* (C. C. A. 10), 73 F. (2d) 861. This was also a mail fraud case.

At pages 866-867:

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, *within the range of a reasonable possibility,* may have affected the verdict of a jury, *appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.* So to hold would, as a practical matter *take from a defendant his right to a fair trial.* * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

The evidence in the instant case aside from all else, was most certainly "conflicting", if, as a matter of fact, it did not disclose the defendant's complete innocence of the charges. It is submitted that from the whole record it cannot be said that a substantial right of the defendant was not prejudicially effected by the errors here presented. Particularly is this true of Assignments XVI, XVII, XVIII heretofore presented.

In the light of the foregoing authorities, attention will now be drawn more closely to the rejected assignments IX to XV inclusive and XXI, XXXI and XXXII. All of them were of most vital concern to the defendant because they challenged the very foundations of the Government's case.

A.

Assignment IX-XV.

The errors here involved have been designated as "Group 2." They were likewise brought forward upon the petition (Br. 11, 22). These assignments challenged the admissibility of the several exhibits which constituted the basis

of the several counts of the indictment. It is impossible at this time to present them separately and in light of the precise record applicable to each. Inspection of the Exhibits will disclose that each is a third party document. Repeatedly there was introduced a large mass of such third party evidence without foundation laid connecting any of such evidence with the defendant. The materiality or relevancy of such evidence was not required to be established by the trial court. In fact, the trial was so conducted that even in matters so vital as the Exhibits forming the indictment counts the government failed in many instances, and was not required by the trial court to prove the gravamen of the offense, the use of the mails. An example only may be stated here, exhibit #52 the basis of count 3 of the indictment is a so-called market letter dated July 13, 1934. A witness Given (R. 138) testified he received it in the mail. Whereupon it was admitted in evidence, over objection upon government counsel statement (R. 138) that it was predicated on "the testimony of Mr. Coventry under which we introduced as one of the exhibits in this case in a whole group of Market letters that were sent out——". The testimony of Coventry (R. 50) covered a period "between the first week of October 1933 and the end of December 1933." This testimony of course does not include Exhibit 52 which was dated July 13, 1934. So if space permitted we might show in each instance a complete relaxing of the rules of evidence by the Court in requirements of proof regarding these vital exhibits. This method of trial was extended as well to a confusing and disorderly mass of third party confirmations, orders and correspondence. Particularly were the vital exhibits introduced over objection without requirement of the clear, positive evidence of the use of the mails as required under the statute. All other considerations apart, each one of them rested, and could only rest, upon the defendant's liability for their

contents and mailing, upon some theory of agency (*Barrett* v. *United States,* 33 F. (2d) 115, 116). It must here suffice to say that, in the considerations under an earlier part of this argument, as is again submitted, it has been made to appear that the theory of this defendant's responsibility and liability for the statements and acts of the various concerns other than his own, and their respective salesmen, is *not* sustainable upon the evidence appearing. That such evidence, admitted as it was, prejudiced the defendant is obvious without argument, hence, it is submitted that under the authorities above cited, those assignments certainly demanded the attention of the Circuit Court.

B.

Assignments XXI, XXXI, and XXXII.

These assignments involved errors in the admission of hearsay evidence and were brought forward (Br. 11, 20) and herein referred to as group 3 (*supra,* P. 2).

The errors under assignments Nos. XXI, XXXI and XXXII, illustrating as they do a course of conduct followed throughout the trial, establish that the error of the admission of hearsay evidence permeated the whole proceedings, and prevented the defendant from having a fair trial. These errors are typical of occurrences throughout the entire trial, and it is earnestly submitted that, along with the errors already considered herein, they permeated the whole case, showed illegal use of evidence, and assured an erroneous verdict. It is believed that but slight consideration of the record setting of these errors will show them to have been of such nature as warranted a consideration of them, regardless of the form in which they may have been assigned.

These assignments go to the admission of hearsay testimony, over objection and exception. They refer to statements and representations alleged to have been made to

the particular witness concerned by third parties not in anywise shown to have been related to the defendant. So far was this carried that, it is submitted, the case appears to have been conducted upon the theory that this defendant was responsible and liable for all actions and all representations made by *any* broker or *any* salesman, regardless of agency, authorization or ratification. Such, it is further submitted, is, of course, not the law. If the instances of this were but few and fugitive, its importance or significance would not become apparent. But when it is found to be continual and consistent, then the fatal consequences of the cumulative effect becomes all too manifest. In truth and in fact, it permeated the record beyond any countervailing considerations.

It has already been seen that the indictment charged the defendant with conducting an alleged brokerage business under four firm names, and operating the Seattle Metal Exchange. The evidence introduced to support this has already been analyzed, and found to be fatally wanting in probative value. Attention to all this is again respectfully invited.

But in particular, and for its relation to the assignments now under consideration, attention will be given to certain aspects not previously fully developed. These relate to the Government's witness, Norman E. Coles. The record discloses that the Norman Edward Co. was an independent brokerage concern, and not an agent of any other broker. The Norman Edward Co., which was Norman E. Coles, as a non-member of the Exchange was bound by the Rules and customs of the Seattle Metal Exchange. He contracted as a principal with his correspondent broker, Louis Martin Co., who was a member of the Exchange. (Exhibit A. 3, R. 395 and 396). Coles so testified. (R. 93). His account with Louis Martin Co. was carried in his firm name and not that of his customers (R. 93), and his orders or con-

tracts with Martin & Co. were signed by his firm and not his customers (R. 92; R. 395, 396, Ex. A-3), and he signed and entered into a margin contract with Martin & Co. (Exhibit A-2, R. 94). He in turn required his customers to enter into an independent, though similar, contract with him (R. 91 and Ex. A-2, R. 75). When *his* account required more margin, it was demanded of him, not his customers, and he was required to make it up (R. 93). The indictment does not charge nor was it claimed in the trial that Coles, or Norman Edward Co., was a co-defendant, co-conspirator, or associate of the defendant.

Twenty-two "investor" witnesses in all were called by the government. None claimed or asserted any obligation due them by the defendant, Lonergan, or that they had any contract or other relationship with him.

All of these witnesses signed marginal agreement cards or "signature" cards (R. 75-77, 91). These disclose clearly that the witnesses knew and understood they were making contracts on "futures". While the agreement provided that contracts would be subject to the rules and regulations of the Seattle Metal Exchange, (Ex. A-2 R. 75) it also provided that the transaction might be made on any other Exchange. This agreement further provided (R. 76) that in the event of default by the customer, the account could be liquidated on any market or exchange and at public or private sale. The independence of the broker from the Seattle Exchange must certainly have been known and accepted by the witnesses. The independence of the brokers in transactions with each other on the Exchange has been heretofore commented on and arises out of the very essence of the transaction. Of the twenty-two witnesses, fifteen "investor" witnesses testified to transactions with the independent broker, Coles. They were Bolling (R. 142); Carroll (R. 123); Cooper (R. 98); Engle (R. 78); Enquist (R. 191); Fend (R. 150); Headley (R. 157); Knoff (R. 140);

Maegher (R. 152); McFaddin (R. 127); McGrew (R. 148); Romer (R. 149); Shattuck (R. 134); Spear (R. 120); and Streepy (R. 153). Among these witnesses were those who testified to the loss of the proceeds of life insurance policies (Knoff); the loss of savings to be used for further education (McFaddin), and others. The hysterical manifestations during this parade of witnesses created such condition in the trial of the case as to require defense counsel repeatedly to call the court's attention to the condition being created and finally to move for a mistrial (R. 141).

In respect to no one of them was any agency from this defendant or any authorization by him, for any statements made to the several witnesses. Yet, actually several weeks of the trial were devoted to the introduction of this evidence, in spite of the most strenuous efforts on behalf of the defendant to show its wholly inadmissible nature, and to exclude it from the jury. In spite of everything, it was allowed to go in. Such practice has been known before. But it has uniformly met with the condemnations of appellate courts.

Hart v. *U. S.*, 240 Fed. 911;
Beck v. *U. S.*, 33 F. (2d) 107;
Barrett v. *U. S.*, 33 F. (2d) 115;
U. S. v. *Brown*, 79 F. (2d) 321.

A similar situation to the instant case is disclosed in *Beck* v. *U. S.*, 33 F. (2d) 107, 112; this was a mail fraud case in which there had been a conviction.

> "3. The Admission of Evidence, (a) over repeated and vigorous objection, the court admitted evidence of conversations between a great many contract holders and a number of salesmen employed by the company, not had in the presence of Beck and not shown to have been authorized by him. The court announced, early in the trial, the theory on which the case was tried:
>
> "But the ruling of the court is, what Mr. Barrett may have said or what the officers of the company of which

he was president may have said, in the discharge of their duties in connection with that company, are binding upon the defendant."

"This ruling was upon the evidence of one Shea, who was not an officer but a salesman, and was adhered to throughout the trial.

"In our opinion, this was error; if error, it was highly prejudicial, for the recollections of a procession of contract holders, mostly women, who had lost their money, of oral promises and representation made some four years before, were lurid and vivid. Guilt is personal and not vicarious. * * * It must be true that no man can be held liable for a false pretense or promise if he neither made the pretense nor authorized it, * * * the doctrine of respondent superior that sometimes holds a principal for representations he neither authorized nor ratified, expressly or impliedly, is a doctrine of civil liability, and not of criminal responsibility. * * * But the trial proceeded on the theory stated by the court that any representation made by those employed by the company was competent, irrespective of Beck's knowledge, authority, or ratification; and this was error. * * * This testimony seems to be prejudicial as well as immaterial."

In a civil case—*Waldron* v. *Waldron,* 156 U. S. 361, 39 L. Ed. 453, in damages for alienations of affection, a divorce decree was admitted for limited purposes. In final argument the entire exhibit was unlawfully urged for general purposes of the case. This court stated at (p. 459).

"Thus the case in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous * * *.

And at page 460:

"We have not rested our decree upon the question of the admissibility of this evidence, because the mere il-

> legal introduction of irrelevant evidence does not necessarily constitute reversible error, and hence we have been compelled to consider, not alone the admission of the irrelevant evidence, but also the illegal use which was made of it."

In *Hermansky* v. *U. S.*, 7 F. (2d) 458 (C. C. A. 8), a criminal case it is said (p. 460):

> "The government contends * * * that under section 269 of the Judicial Code (Comp. St. Sec. 1246) the error, if such, would not be a reversible one. * * * While we consider the introduction of this evidence as error, we would not deem it sufficient, standing alone, to require a reversal. (Citing cases.)"

and at p. 461:

> "While, under amended section 269, a case will not be reversed for technical errors, which do not affect the substantial rights of defendant, and while each particular error herein referred to may not in itself affect such rights, yet we feel that, when these various errors are considered together, it leads to the inevitable conclusion that defendant did not receive that fair and impartial trial to which he is entitled under the law."

Under the authorities cited: It is submitted that the error involved in the assignments now under consideration constituted substantial error, both in individual instances and in the accumulative effect of all such errors. In the light of the whole record it is apparent that illegal use was made of this evidence and probably resulted in an erroneous verdict. This, it is submitted, was error of such nature as to warrant consideration by the Circuit Court, under the circumstances of this case.

Conclusion.

As was urged at the outset, it is indispensable in this case to get a perfectly clear picture of the *whole* of what it presents, *without* distortion or over-emphasis in *any*

part. When this is done, it is submitted it becomes wholly apparent that *all* difficulty encountered by the Seattle Metal Exchange, or by any of those having any dealings with it, was due solely and entirely to the *changes* in legislation and national policy wrought by the silver purchase act of *June, 1934,* which finally resulted in removing silver from the field of trading. Until this dislocating act was passed, the Seattle market was functioning as well as was its prototype in New York City. *No difficulty* whatever had arisen over the whole period from 1931, and most certainly none since *June, 1933.* But when that enactment came in June, it caught the enterprise in full flight, and paralyzed all its faculties. What to do, or how to do it, was not then known. Nor could it be, with any certainty, for some time to come. Steps taken under such circumstances must be judged accordingly. Without the fullest cooperation in such case, complete salvage is certainly impossible. And it cannot appear strange if the holders of contracts who fail to perform as the unforeseen exigency demands do not come out unscathed. But, for the occurrence of such radical national action, neither the market, nor those conducting their business upon it, can properly be held to blame. Certainly not this defendant whose relations to the whole were what the evidence has been shown to establish them. The act of 1934 ought not to be permitted to bring about his branding as a criminal. Yet, the present conviction brings that very thing to pass.

In conclusion it is submitted that the error of the trial court in admitting into evidence Exhibit 75 was such grave and prejudicial error, transcending all rules of evidence, as to foreclose the arrival at a verdict by the jury by any rational process free from prejudice, that this error was one of substantive law in that it subverted the established procedure of trial under the Anglo-American system of trial by jury. Such error it is submitted is plain substan-

tial error. And an examination of the Exhibit discloses that in the light of the whole record the defendant could not be other than by its admission in evidence. In any event the record does not affirmatively show that the defendant was not prejudiced and therefor he is entitled as a matter of right to a new trial, under established law, applicable to criminal trials.

In connection with the admission of hearsay exhibits including, even to those made the basis of various counts of the indictment; and in connection with hearsay testimony of the class demonstrated under assignments XXI, XXXI and XXXII, the whole record discloses that the trial was so conducted as to permit these errors in evidence to permeate the whole record, and in some instances to permit the illegal use of such evidence, and resulting in an erroneous verdict.

It is submitted that all of these errors were of such nature as to have required the Circuit Court of Appeals for the Ninth Circuit to consider and pass upon them under the circumstances of this case; and the failure of that court so to do sanctioned the error of the trial court. These errors constituted such a departure from established judicial procedure as to warrant the exercise of the supervisory powers of this court.

Wherefore the Petitioner prays that the judgment of conviction herein be reversed and set aside.

Respectfully submitted,

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